

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LOVELAND INDUSTRIES, INC. d/b/a  
UAP WEST, a Colorado corporation,

Plaintiff,

v.

WILBUR-ELLIS COMPANY, a California  
corporation; DOUGLAS SNYDE, an  
individual; WILLIAM FRANCIS, an  
individual; ARMON AZEVEDO, an  
individual; and DOES 1 through 20,  
inclusive,

Defendants.

No. C 05-0840-SC

ORDER AFFIRMING AND  
CLARIFYING THIS  
COURT'S APRIL 22,  
2005 ORDER AND  
GRANTING PLAINTIFF'S  
MOTION FOR A  
PROTECTIVE ORDER

**I. Introduction**

Plaintiff Loveland Industries, Inc. d/b/a UAP West ("Plaintiff" or "Loveland") brings this action alleging, among other things, misappropriation of trade secrets against three former employees and their present employer, Wilbur-Ellis Company (collectively, "Defendants"). Plaintiff has also filed Motions for a Temporary Restraining Order and Preliminary Injunction, which are now set to be heard before this Court on May 19, 2005. Presently before this Court are various discovery and pre-discovery related motions filed by both parties, the resolution of which are necessary prior to the TRO/Preliminary Injunction

Hearing. Accordingly, and for the reasons discussed herein, the Court affirms its previous Order granting Defendants' motion to compel Plaintiff to disclose with specificity the trade secrets allegedly misappropriated in compliance with California CCP § 2019(d). Further, the Court adopts Plaintiff's proposed Protective Order, provided it is altered in compliance with this Order. Finally, the Court denies Defendants' motion to unseal the Castellon Declaration, and orders both parties to proceed with discovery in accordance with the Federal and local rules.

## **II. Procedural Background**

Plaintiff filed this action on February 28, 2005. Plaintiff's complaint alleges, among other things, that Defendants misappropriated Plaintiff's trade secrets in violation of California Civil Code § 3426, that Defendants violated the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030, *et seq.*, and that Defendants violated various aspects of the California Business & Professions Code § 17200. On March 31, 2005, Plaintiff moved this Court to issue a Temporary Restraining Order and set a hearing on a Preliminary Injunction. The Court set a hearing on the TRO and both parties appeared before this Court on April 8, 2005. At the hearing, the Court ordered Plaintiff to provide Defendants with information specifying the trade secrets Plaintiff believed to be misappropriated, and to make available to Defendant any materials Plaintiff filed under seal. Both parties agreed to continue the hearing on the TRO and Preliminary Injunction to May 9, 2005.

On April 15, 2005, Plaintiff filed an *ex parte* application

1 for a Protective Order, and also sought the Court's permission to  
2 file a declaration ("Castellon Declaration") under seal. Because  
3 the Court was not ready to issue a protective order until it had a  
4 chance to hear from Defendants, the Court allowed Plaintiff to  
5 file the Castellon Declaration under seal, subject to the Court's  
6 standing order that all sealed evidence be made available to  
7 Defendants' counsel. On April 18, 2005, Defendants filed an  
8 Opposition to Plaintiff's Motion for a Protective Order, and a  
9 Motion for Administrative Relief to Unseal the Castellon  
10 Declaration. Defendants attached to these motions Defendants' own  
11 suggested Protective Order. On April 20, 2005, Defendants filed  
12 another round of motions, seeking Orders from the Court compelling  
13 Discovery responses and Plaintiff's CCP 2019(d) Disclosure, in  
14 addition to an interim Protective Order pending such compliance.  
15 This Court issued a brief Order on April 22, 2005, in which it  
16 Ordered Plaintiff to produce to Defendants a specification of the  
17 alleged "trade secrets" that form the basis of this action, in  
18 compliance with California Code of Civil Procedure § 2019(d).  
19 Plaintiff filed an opposition to Defendants' pending motions on  
20 April 25 as well as a Motion for Reconsideration of the Court's  
21 April 22 Order. Finally, on April 26, 2005, Plaintiff filed a  
22 Motion to Compel Defendants to produce certain computer property  
23 in Defendants' possession, to which Defendants object.

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### III. Legal Standards

#### A. Motion to Compel

In general, parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party. Fed.R.Civ.P. 26(b)(1). For good cause, the Court may order discovery of any matter relevant to the subject matter involved in the action. Id. A motion to compel a discovery response is appropriate when a party disobeys a proper request by refusing to produce relevant, nonprivileged discovery. See Fed.R.Civ.P. 37(a)(2). The movant must certify that it has in good faith conferred or attempted to confer with the party failing to make discovery in an effort to secure information or material without court action. See id.

#### B. Protective Order

"It is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public." Philips v. Gen. Motors, 307 F.3d 1206, 1210 (9th Cir. 2002). When a party makes a motion asserting good cause for a protective order pursuant to Rule 26(c), "the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue expense or burden including ... that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." Fed. R. Civ. P. 26(c). Under Rule 26(c), "the party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that

specific prejudice or harm will result if no protective order is granted." Foltz v. State Farm Mut. Aut. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003) (citations omitted). "Where a business is the party seeking protection, it will have to show that disclosure would cause significant harm to its competitive and financial position. That showing requires specific demonstrations of fact, supported where possible by affidavits and concrete examples, rather than broad, conclusory allegations of harm." Deford v. Schmid Prods. Co., 120 F.R.D. 647, 653 (D. Md. 1987). "[B]road allegations of harm, unsubstantiated by specific examples of articulated reasoning do not satisfy the Rule 26(c) test." Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 476 (9th Cir. 1992). If the Court finds that Plaintiffs have met their burden to show particularized harm will result from disclosure of the information to the public, the court must then balance the public and private interests to decide whether protection is warranted.<sup>1</sup> Phillips, 307 F.3d at 1211. A judge has broad discretion "to decide when a protective order is appropriate and what degree of protection is required." Id.

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<sup>1</sup>In balancing the public and private interests, courts have looked to the following factors: (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public. Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995), cited with approval in Phillips, 307 F.3d at 1211-12.

**IV. Discussion**

To resolve the parties dispute prior to the hearing on the TRO, the Court must consider both parties' requests for Protective Orders and various motions to compel. For the reasons discussed below, this Court finds that Plaintiff must be compelled to identify its trade secrets with a higher level of specificity prior to the commencement of discovery. To guard against improper use of this information, this Court also finds that Plaintiff is entitled to a Protective Order.

**A. CCP 2019(d)**

On May 9, 2005, the Plaintiff will appear before this Court to argue that Defendants must be enjoined from further use, disclosure or dissemination of trade secrets wrongfully taken from Plaintiff. In order for this Court to consider Plaintiff's position, and indeed, in order for Defendants to defend against it, Plaintiffs must first reveal to its opponents and the Court which of its trade secrets are implicated. California law requires as much. Section 2019(d) of the California Code of Civil Procedure states:

In any action alleging the misappropriation of a trade secret under the Uniform Trade Secrets Act (Title 5 (commencing with Section 3426) of Part 1 of Division 4 of the Civil Code), before commencing discovery relating to the trade secret, the party alleging the misappropriation shall identify the trade secret with reasonable particularity subject to any orders that may be appropriate under Section § 3426.5 of the Civil Code.

Cal. Civ. Code § 2019(d). Section 3426.5 allows the court to issue a protective order to ensure the confidentiality of Plaintiff's trade secret identification. One Federal court found

1 that CCP § 2019(d) "promotes well-investigated claims, frames the  
2 appropriate scope of discovery, prevents needless discovery  
3 disputes, and enables defendants to form complete and well-  
4 reasoned defenses." Computer Economics, Inc. v. Gartner Group,  
5 Inc., 50 F. Supp. 2d 980, 992 (S.D. Cal. 1999). Moreover, CCP §  
6 2019(d) "harmoniously coexists with various provisions of [Federal  
7 Rule of Civil Procedure] 26 and enhances the court's ability to  
8 control discovery in trade secret cases." Id.

9 Plaintiff argues that it has already complied with the  
10 requirements of CCP § 2019(d) by delivering to Defendants a  
11 document describing certain computer files allegedly taken by  
12 Defendants from Plaintiff's place of business. Defendant urges  
13 this Court to require Plaintiff to specify how the information  
14 contained in these files differs from publicly available  
15 information.

16 This Court finds that Plaintiff has not yet specified its  
17 trade secrets with reasonable particularity. To the Court's  
18 knowledge, Plaintiff attempted to meet its 2019(d) obligations  
19 through a single document describing various computer files.  
20 Although the threshold requirements of section 2019(d) are  
21 minimal, more is required of Plaintiff than a description of  
22 various computer files. See Excelligence Learning Corp. v.  
23 Oriental Trading Co., 2004 WL 2452834 \*4 (N.D. Cal. 2004). In  
24 essence, what section 2019(d) requires is that Plaintiff inform  
25 Defendants of the proprietary information that differs from other  
26 publicly available information or data commonly known to those in  
27 the trade. Plaintiff may meet its burden by demonstrating where

1 certain data was developed exclusively by Plaintiff for the  
2 benefit of its business, how such data is materially different  
3 from other publicly available data or data commonly known in the  
4 trade, and how Plaintiff sought to keep that information  
5 confidential.

6 Once Plaintiff has met the requirements of section 2019(d),  
7 Defendant may not continue to postpone discovery by making various  
8 objections to the merits of Plaintiff's trade secrets claims.  
9 Whether information provided to the government or to third parties  
10 renders potential trade secrets non-confidential are issues to be  
11 determined at a later stage of this litigation. For the purposes  
12 of discovery, Plaintiff need only comply in good faith with the  
13 "threshold requirements of Section 2019(d) for the purposes of  
14 commencing discovery." Excelligence Learning, 2004 WL 2452834 at  
15 \*4.

16  
17 B. Protective Order

18 As noted above, when a party is required to make a section  
19 2019(d) disclosure, that party is entitled to an order from the  
20 Court protecting its confidential information. "[I]ssuance of a  
21 protective order is essential to ensuring that a plaintiff who  
22 complies with CCP § 2019(d) can prevent inadvertent disclosure of  
23 its trade secrets. In federal court, a plaintiff may alleviate  
24 its legitimate concerns that its trade secrets will be disclosed  
25 to third parties by applying for a protective order under Rule  
26 26(c)(7) before it complies with CCP § 2019(d)." Computer  
27 Economics, Inc. v. Gartner Group, Inc., 50 F. Supp. 2d 980, 988-89



(S.D. Cal. 1999).

To this point, the parties have been unable to agree to a stipulated protective order. On the one hand, Plaintiff insists on having the option of being able to designate material "For Attorneys' Eyes Only" to prevent the individual Defendants from controlling and using this information in their capacity as employees of one of Plaintiff's competitors. Defendants object that the individual Defendants should be able to work with their attorneys to identify and evaluate the material produced, and should have access to all information--even that designated "Attorneys' Eyes Only."<sup>2</sup> This Court agrees that the individual defendants should be able to view all of the material produced in this action against them.

Plaintiff, however, is entitled to a significant level of protection from having proprietary information used by either its former employees or by its competitors. Therefore, this Court orders the parties to make the following change to Plaintiff's Proposed Protective Order: the designation "Highly Confidential--Attorney's Eyes Only" shall be deleted. Instead, the Protective Order shall allow two levels of designation: 1) "Highly Confidential" and 2) "Confidential." Under either designation, Defendants may provide the named Defendants in this action with

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<sup>2</sup>Defendants have submitted a Proposed Protective Order to this Court that, in addition to differing from Plaintiff's Proposed Protective Order on the levels of designation, also includes substantive language defining trade secrets. See, e.g., Weil Decl., Ex. L, ¶ 5.1. The Court observes that this language goes to the merits of this dispute and is clearly beyond the scope of the protective order; it will not be included.

1 copies of the disclosed information. At all times, the named  
2 Defendants will be subject to contempt for any misuse or  
3 disclosure of the protected information.  
4

5 **V. Conclusion**

6 This Court HEREBY GRANTS Plaintiff's Motion for a Protective  
7 Order. Plaintiff is directed to make changes to its Proposed  
8 Protective Order in accordance with the discussion above, and  
9 submit a copy to the Court for approval within 2 days of the date  
10 of this Order. Moreover, and also in accordance with the  
11 foregoing, this Court HEREBY ORDERS Plaintiff to describe with  
12 greater particularity the trade secrets it seeks to protect  
13 through this action. Plaintiff should submit such information to  
14 the Court and to Defendants on the day following this Court's  
15 approval of its Protective Order. Parties are ORDERED to appear  
16 before the Court on May 19, 2005 at 10:00 a.m. for hearing on  
17 Plaintiff's Motion for TRO and Preliminary Injunction.  
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20 **IT IS SO ORDERED.**

21 Dated: May 6, 2005  
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23 /s/ Samuel Conti  
24 UNITED STATES DISTRICT JUDGE  
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